U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 April 2003

Case No: 2000-BLA-0007

In the Matter of

DONNIE RAY GRAY
Claimant

v.

NALLY & HAMILTON ENTERPRISES
Employer

AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:

Joseph E. Wolfe, Esq.
WOLFE & FARMER
Norton, Virginia

For Claimant

John H. Baird, Esq.
BAIRD & BAIRD, P.S.C.
Pikeville, Kentucky

For the Employer

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER — AWARDING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. § 901 *et seq.* Under the Act, benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis, commonly known as black lung, is defined in the Act as "a chronic dust disease of the lung and its sequelae, including pulmonary and respiratory impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

On September 30, 1999, this case was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held in Richmond, Kentucky on December 3, 2002. The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. They also are based upon my observation of the appearance and demeanor of the witness who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been reviewed carefully, particularly those related to the Claimant's medical condition. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to "DX," "EX," and "CX" refer to the exhibits of the Director, Employer, and Claimant, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

The following issues remain for resolution:

1. Whether Claimant has pneumoconiosis as defined by the Act and regulations;

2. Whether Claimant's pneumoconiosis arose out of coal mine employment;

3. Whether Claimant is totally disabled; and

4. Whether Claimant's disability is due to pneumoconiosis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

Claimant, Donnie Ray Gray, was born on November 8, 1957. He has a seventh-grade education and reads at a second-grade level. (Tr. 35). Claimant married Wilma D. Bowling on November 30, 1991, and they reside together. On his application for benefits, Claimant alleged that he has one dependent child, Donyia L. Gray. (DX 1). At the time the claim was filed, Donyia L. Gray was fourteen years old.

Mr. Gray ended his coal mine employment on August 8, 1998. (Tr. 28). He had been "smothering and hurting in [his] chest" for a week prior to that date. On August 8, 1998, Mr. Gray had been experiencing chest pain and dyspnea throughout the work day. (DX 12). He went to the emergency room that night. He did not return to work under his physician's orders. (Tr. 28). Mr. Gray suffers from dyspnea upon slight exertion. He has a smothering feeling and has difficulty sleeping. Although there are some various accounts of Mr. Gray's smoking history, the vast majority of accounts state that Mr. Gray smoked one package of cigarettes per day for ten years. He quit smoking in 1990. Therefore, I find that Mr. Gray smoked one package of cigarettes per day for ten years, quitting smoking in 1990.

Claimant filed his application for black lung benefits on October 27, 1998. The Office of Workers' Compensation Programs denied the claim on February 18, 1999. (DX 10). After reviewing additional evidence, the Director approved Mr. Gray's claim on April 14, 1999 and August 10, 1999. In a letter dated August 26, 1999, the Director notified Mr. Gray that he would be receiving Black Lung benefits in the amount of $821.60 per month from the Black Lung Disability Trust Fund as the Employer requested a formal hearing and would not begin payments until final adjudication of the claim. (DX 25). Pursuant to Employer's request, the case was transferred to the Office of Administrative Law Judges for a formal hearing. (DX 26).

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. At the hearing, the parties stipulated that Claimant worked twenty-two (22) years in qualifying coal mine work. Based upon my review of the record, I accept the stipulation as accurate and credit Claimant with twenty-two (22) years of coal mine employment.

For the entirety of Claimant's coal mine employment he operated a drill. The drill was used to remove portions of surface rock to allow for the placement of blasting materials. (Tr. 24-25). Ninety percent of Mr. Gray's ten- to twelve-hour working day was spent inside the cab of the drill machine. (Tr. 27). For the first ten years, Claimant worked in a drill machine with an open cab. For the remainder of his employment, he worked in a closed cab with air-conditioning. When outside of the cab of the machine, he was provided with a paper mask as protection against the dust. Mr. Gray testified that a "mist of dust [blew] up" out of the holes he drilled throughout the working day. (Tr. 26). By the end of the working day, Mr. Gray was covered in a film of coal dust. This was true even after Mr. Gray was provided with a closed-cab drill machine with air-conditioning. He testified that even under those conditions, dust came into the cab. (Tr. 27).

MEDICAL EVIDENCE

X-ray reports

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
CX 6	08/01/00	08/01/00	Goldwin/B, BCR	3/2, Category A large opacities
CX 2	04/13/00	04/13/00	Coburn/unknown	Significant pneumoconiosis, progressive massive fibrosis
CX 5	04/03/00	06/09/00	De Ponte/B, BCR	2/3, Category A large opacities
CX 2	04/03/00	04/12/00	Robinette/B	3/2, Category A large opacities
CX 10	03/09/00	03/09/00	Westerfield/B	3/3
EX 5	02/04/99	05/26/00	Scott/B, BCR	2/3
EX 4	02/04/99	05/25/00	Wheeler/B, BCR	2/3
DX 12	02/04/99	02/04/99	Broudy/B	3/3
EX 6	11/19/98	05/30/00	Broudy/B	3/2
DX 13	11/19/98	04/27/99	Wheeler/B, BCR	0/1
DX 13	11/19/98	04/26/99	Scott/B, BCR	1/1
DX 8	11/19/98	12/09/98	Sargent/B, BCR	3/2
DX 8	11/19/98	11/19/98	Baker/B	3/3

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
CX 9	11/13/98	06/06/00	Broudy/B	Category A large opacities
EX 5	11/13/98	05/28/00	Scott/B, BCR	No assessment of the presence or absence of pneumoconiosis
EX 4	11/13/98	05/25/00	Wheeler/B, BCR	Positive for pneumoconiosis
DX 13	08/14/98	04/27/99	Wheeler/B, BCR	0/1
DX 13	08/14/99	04/26/99	Scott/B, BCR	1/1
DX 16	08/14/98	04/07/99	Sargent/B, BCR	3/2
DX 19	08/14/98	08/14/98	De Ponte/B, BCR	3/3; Category A large opacities
DX 13	08/12/98	04/27/99	Wheeler/B, BCR	0/1
DX 13	08/12/98	04/26/99	Scott/B, BCR	1/1
DX 15	08/12/98	03/20/99	Sargent/B, BCR	3/2
DX 14	08/12/98	08/12/98	Collatz/unknown	Positive for pneumoconiosis
DX 14	08/08/98	08/08/98	Antoun/unknown	Extensive pneumoconiosis
EX 6	04/14/98	05/30/00	Broudy/B	3/2
EX 6	04/12/98	05/30/00	Broudy/B	3/2

"B" denotes a "B" reader and "BCR" denotes a board-certified radiologist. A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services (HHS). A board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. *See* 20 C.F.R. § 718.202(a)(ii)(C).

Pulmonary Function Studies

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
08/01/00	Mallampalli	42/78	3.33	4.77	136	70	YES	
04/03/00	Robinette	42/77	3.62	4.88		74	YES	
03/09/00	Westerfield	42/78	3.52	4.94	128	71	YES	Mild restrictive
CX 10			*3.69	*4.95	*140	75		dysfunction
02/04/99	Broudy	41/78	3.72	4.86	124	77	YES	Mild restrictive defect
DX 12			*3.87	*4.84	*139	80		
11/19/98	Baker	41/78	3.73	4.75	136	79	YES	Good cooperation
DX 8								
11/13/98	Berger	41/78	3.77	5.15		73	YES	
DX 19								

*post-bronchodilator values

Arterial Blood Gas Studies

Exhibit	Date	pCO_2	pO_2	Resting/ Exercise
CX 6	08/01/00	39.5	91	Resting
CX 2	04/03/00	36.4	88	Resting
DX 12	02/04/99	40.7	85.9	Resting
		38.7	75.5	Exercise
DX 8	11/19/98	41.7	84.8	Resting

CT Scan

Dr. Robert L. Keeling and Dr. James L. Buck administered a CT scan on November 13, 1998. (DX 19). The radiology report detailed the findings from the CT scan. The physicians found "innumerable bilateral soft tissue pulmonary nodules, the average diameter of which measure 1-3 millimeters with upper lobe predominant distribution." In addition they reported a "borderline 1 centimeter prevascular node with a few other borderline mediastinal nodes." They noted that the distribution of the nodules did not favor a diagnosis of tuberculosis or other infectious disease. They did not opine to the presence or absence of pneumoconiosis. Neither Dr. Keeling's nor Dr. Buck's qualifications are of record.

Narrative Medical Evidence

Rolando Berger, M.D., examined Claimant on August 21, 1998 and issued a report on that date. (DX 19). Considering accurate work and smoking histories, Dr. Berger opined that Claimant suffered from pulmonary silicosis and early stage progressive massive fibrosis. He reviewed a chest x-ray and clinical and laboratory data provided by Dr. Fred Collatz who had examined Claimant previously. Dr. Berger's qualifications are not of record.

Glen R. Baker, M.D., examined Claimant on November 19, 1998 and submitted an examination report on that date. (DX 8). He provided a full pulmonary workup including a chest x-ray, pulmonary function study and arterial blood gas study. He also considered twenty-two years of aboveground coal mine employment and fifteen years of smoking one pack per day. Dr. Baker opined that Claimant suffered from coal workers' pneumoconiosis, bronchitis and a mild restrictive defect. He determined that coal dust exposure caused Claimant's pneumoconiosis and restrictive defect and that coal dust exposure plus smoking contributed to his bronchitis. Dr. Baker found Claimant to have a mild impairment. Dr. Baker is a pulmonary specialist.

Julia A. Weeks, M.D., performed a transbronchial biopsy[1] on November 19, 1998 taking a tissue sample from Claimant's upper left lobe of his lung. (DX 19). The pathology report states that the biopsy was requested after the results of a CT scan showed "fibronodular disease." The purpose of the biopsy was to "rule out

[1] This procedure involves a flexible half-inch wide, two-feet long bronchoscope tube that is fed through the nose or mouth down into the lungs. Tiny forceps contained within the bronchoscope extract a small sample of lung tissue.

silicosis." From the biopsy sample, Dr. Weeks found evidence of silica dust. She concluded that the findings were "compatible with but not diagnostic of silicosis." (DX 19). Dr. Weeks' qualifications are not of record.

Bruce C. Broudy, M.D., examined Claimant on February 4, 1999 and submitted an examination report on that date. (DX 12). Dr. Broudy also submitted supplemental reports on May 19, 2000, May 30, 2000, and June 6, 2000. (EX 3, 6, CX 9). He provided a full pulmonary workup which included a chest x-ray, pulmonary function test and arterial blood gas study. He considered accurate smoking and work histories in the opinion. Dr. Broudy opined that Claimant suffered from advanced simple coal workers' pneumoconiosis in his opinion of February 4, 1999. In that opinion, he also determined that Claimant had the respiratory capacity to do coal mine work or similar labor. In the opinions of May 19 and 30, Dr. Broudy reviewed the medical evidence of record. He opined that the biopsy specimen may be insufficient to diagnose pneumoconiosis or silicosis. (EX 3, 6). In the June 6, 2000 report, Dr. Broudy reviewed the results of a CT scan that had been performed. With this data, Dr. Broudy opined that there were "some nodular opacities in the upper lobes which exceed 1 cm. in diameter and thus would qualify as complicated pneumoconiosis or progressive massive fibrosis. It certainly would be no greater than Stage A." (CX 9). Dr. Broudy is board-certified in Internal Medicine and Pulmonary Medicine.

Byron T. Westerfield, M.D., examined Claimant on March 9, 2000 and submitted a report on that date. (CX 10). Dr. Westerfield provided a full pulmonary workup including a chest x-ray, pulmonary function study, arterial blood gas study, and EKG. He considered twenty-two years of above ground coal mine employment and a smoking history of five pack years. He also considered the biopsy results. Dr. Westerfield opined that Claimant had pneumoconiosis and silicosis and that he was "developing fibrosis particularly in the left upper lobe. Dr. Westerfield reported that he had also examined Claimant on February 25, 1999.[2] He noted progression of the disease in Claimant as shown by the x-rays and the decrease in pulmonary function as evidenced by the pulmonary function study and arterial blood gas study results. Dr. Westerfield is board-certified in Internal Medicine and Pulmonary Medicine.

Emory H. Robinette examined Claimant on April 12, 2000 and submitted an examination report on that date. (CX 2). Dr.

[2] There is no report for Dr. Westerfield on that date in the record.

Robinette provided a full pulmonary workup which included a chest x-ray, pulmonary function study, arterial blood gas study and EKG. Taking accurate work and smoking histories into consideration, he diagnosed Claimant with complicated pneumoconiosis with underlying progressive massive fibrosis. He attributed this condition to coal dust exposure. Dr. Robinette opined that Claimant is totally disabled due to the progressive deterioration of his lung function. Dr. Robinette is board-certified in pulmonary medicine.

Grover M. Hutchins, M.D., issued an independent medical review on May 4, 2000. (EX 2). Dr. Hutchins examined one histologic slide from the 1998 transbronchial biopsy. He found a "small amount of pulmonary parenchyma which contains a very small amount of coal dust and a moderate amount of birefingent silicate-type particles." He found no "macules, micronodules, macronodules, or lesions of progressive massive fibrosis." In addition, Dr. Hutchins reviewed the results of the CT scan and pulmonary function studies. He noted that these reports found the presence of pulmonary nodules and a restrictive defect respectively. He opined that Claimant did not suffer from pneumoconiosis or silicosis. Dr. Hutchins is board-certified in Pathology with special qualifications in Pediatric Pathology.

Antara Mallampalli, M.D., examined Claimant on August 1, 2000 and submitted a report on that date. (CX 6). A chest x-ray, pulmonary function study, arterial blood gas study and EKG were performed. Considering accurate work and smoking histories, Dr. Mallampalli diagnosed Claimant with coal workers' pneumoconiosis and silicosis. The record does not contain the qualifications of Dr. Mallampalli.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. To establish entitlement to benefits under this part of the regulations, a claimant must prove by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §725.202(d); *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). In *Director, OWCP v. Greenwich Collieries, et al.*, 114 S. Ct. 2251 (1994), the U.S. Supreme Court stated that where the evidence is equally probative, the claimant necessarily fails to satisfy his burden of proving the existence of pneumoconiosis by a preponderance of the evidence.

Pneumoconiosis and Causation

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. In evaluating the x-ray evidence, I assign heightened weight to interpretations of physicians who qualify as either a board-certified radiologist or "B" reader. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). I assign greatest weight to interpretations of physicians with both of these qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). Because pneumoconiosis is a progressive disease, I also may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989) (en banc); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986).

The evidence of record contains twenty-seven (27) interpretations of twelve (12) chest x-rays. Of these interpretations, one (1) was negative for pneumoconiosis while twenty-six (26) were positive. The majority of the five most recent x-rays are interpreted to show complicated pneumoconiosis with Category A large opacities.[3] Eleven months separate these most recent x-rays from the previous x-rays. I find this to be a significant amount of time, which entitles the more recent chest x-rays to more weight as pneumoconiosis is a progressive disease. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989) (en banc); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986). Because the positive readings constitute the majority of interpretations and are verified by more, highly-qualified physicians, I find that the x-ray evidence supports a finding of pneumoconiosis under Section 718.202(a)(1). In addition, all five of the most recent x-rays are positive for pneumoconiosis and four of those x-rays are positive for complicated pneumoconiosis. Among those physicians opining to the presence of complicated pneumoconiosis, two are dually qualified physicians, one is a B-reader, and the qualifications of one is not in the record. Therefore, as the majority of the most recent x-ray interpretations

[3] The most recent x-rays range from March 9, 2000 to August 1, 2000. (CX 2, 5, 6, 10).

find complicated pneumoconiosis and are verified by highly-qualified physicians, I find that the x-ray evidence supports a finding of complicated pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy evidence. Two physicians of record reviewed the specimen obtained in the transbronchial biopsy. The pathology report states that the biopsy was requested after "fibronodular disease" was discovered on a CT scan. (DX 19). The purpose of the biopsy was to "rule out silicosis." The sample of lung tissue taken from the left upper lobe of Mr. Gray's lung measured 1.0 x 0.6 x 0.2 cm and included "fragments of the bronchial wall" and "cartilage with attached areas of parenchymal tissue." (DX 19). Dr. Weeks reported that the sample contained coal dust and silicate material, and found the results "compatible with but not diagnostic of silicosis." (DX 19). Dr. Broudy commented on the biopsy sample,

> I believe the evidence supports the conclusion that he had silicosis. The pathological evidence, while not diagnostic of silicosis does not refute the diagnosis and gives the suggestion that he indeed may have had silicosis. A transbronchial biopsy obtains only a small specimen and it is usually not sufficient to diagnose coal workers' pneumoconiosis or silicosis.

(EX 3). Dr. Broudy reviewed Dr. Weeks' biopsy findings, but did not view the tissue sample himself. Two other physicians of record found the biopsy results supportive of the diagnoses from the x-rays and CT scan. Dr. Westerfield opined that the biopsy "confirm[ed] the diagnosis of silicosis." (CX 10). Dr. Robinette found the biopsy evidence to be "consistent with progressive massive fibrosis without evidence of malignancy or tuberculosis." (CX 2). Dr. Hutchins opined that Claimant did not suffer from pneumoconiosis or silicosis, although noted the presence of coal dust and silicate in the tissue sample. It is not apparent from Dr. Hutchins opinion that he considered that the biopsy was taken only with the intention to rule out silicosis and not to diagnose pneumoconiosis, simple or complicated. I conclude the medical evidence supports a finding that the biopsy sample was insufficient in size to diagnose pneumoconiosis. *See generally Hawker v. Zeigler Coal Co.*, BRB No. 99-0434 (Aug. 23, 2000)(unpublished); *Cook v. Westmoreland Coal Co.*, BRB No. 99-0891 (June 22, 2000)(unpublished). Therefore, the biopsy evidence fails to establish pneumoconiosis under Section 718.202(a)(2).

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. As discussed above, I find that the x-ray evidence establishes that Claimant has complicated pneumoconiosis, the record supports a finding of pneumoconiosis under Section 718.202(a)(3). The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively.

Section 718.202(a)(4) provides that a claimant may establish the presence of pneumoconiosis through a reasoned medical opinion.

Dr. Hutchins is the only physician of record who opined that Claimant did not suffer from pneumoconiosis or silicosis. Dr. Hutchins is board-certified in Pathology with special qualifications in Pediatric Pathology. His Curriculum Vitae reveals no special training in pulmonary disease. Dr. Hutchins reviewed pulmonary function studies and the CT scan in addition to reviewing the biopsy slide. Although Dr. Hutchins notes the presence of nodules in the CT scan and that the pulmonary function studies evidenced a restrictive defect, he found that Claimant did not suffer from pneumoconiosis. He offered no etiology for these findings, no alternative diagnosis, or reasoning for finding the absence of pneumoconiosis. As discussed above, the medical evidence supports a finding that the biopsy sample was too small to diagnose pneumoconiosis or silicosis. For these reasons, I find Dr. Hutchins opinion to be poorly documented and reasoned. Therefore, I assign it less weight.

Dr. Broudy considered x-rays, pulmonary function studies, arterial blood gas studies, exam findings, and the CT scan and biopsy reports in making his determination that Claimant suffered from complicated pneumoconiosis with Category A large opacities. His opinion is well documented and reasoned and entitled to full weight. In addition, due to Dr. Broudy’s certifications in Internal Medicine and Pulmonary Medicine, I assign his opinion additional weight.

Drs. Baker, Berger, and Robinette based their opinions on examination findings, work and social histories, and the results of chest x-rays, pulmonary function studies and arterial blood gas studies. Dr. Baker diagnosed Claimant with pneumoconiosis and a mild restrictive defect. Dr. Berger determined that Claimant suffered from pulmonary silicosis and early stage progressive massive fibrosis. Dr. Robinette examined Claimant almost two years

after Drs. Baker and Berger and diagnosed Claimant with complicated pneumoconiosis and progressive massive fibrosis. I find their opinions to be well documented and reasoned and entitled to full weight. Furthermore, Drs. Baker and Robinnette are pulmonary specialists entitling their opinions to additional weight.

Dr. Westerfield based his opinion on examination findings, an x-ray, a pulmonary function study, an arterial blood gas study, the biopsy report, and observed changes from his previous examination of Claimant. He noted progressive massive fibrosis developing in the upper left lobe of Claimant's lung. He diagnosed Claimant with pneumoconiosis and silicosis. He concluded, "[u]nfortunately, Mr. Gray is showing progression of his Silicosis and Coal Workers' Pneumoconiosis." (CX 10). I find his opinion to be well documented and reasoned and assign it full weight. His certifications in Internal Medicine and Pulmonary Medicine entitle his opinion to additional weight.

Dr. Mallampalli's opinion is based upon examination findings and the results of an x-ray, pulmonary function study, arterial blood gas study, EKG and the biopsy report. Dr. Mallampalli concluded that Claimant suffered from pneumoconiosis and silicosis from this data. Although Dr. Mallampalli noted Category A large opacities on the x-ray, he did not opine as to the presence or absence of complicated pneumoconiosis. I find Dr. Mallampalli's opinion to be well documented and reasoned and entitled to full weight.

All the physicians of record, with the exception of Dr. Hutchins, have opined that Claimant has pneumoconiosis. Except for Dr. Hutchins' opinion, I have found the physician opinions of record to be well documented and reasoned. Therefore, I find that the weight of the evidence of record supports a finding of pneumoconiosis under Section 718.202(a)(4).

Regarding the presence of complicated pneumoconiosis, Drs. Broudy and Robinette opined that Claimant suffers from that disease. Drs. Baker, Berger, and Westerfield did not report the presence of pneumoconiosis. Dr. Mallampalli noted findings of large opacities from the x-ray performed during that examination, but did not opine as to the presence or absence of complicated pneumoconiosis. As Dr. Mallampalli's opinion is unclear regarding the presence of complicated pneumoconiosis and Dr. Hutchins found no pneumoconiosis in any form, I do not consider their opinions supportive of a determination as to whether Mr. Gray suffers from complicated pneumoconiosis.

Among those physicians addressing complicated pneumoconiosis, Drs. Robinette and Westerfield most recently examined Claimant in the year 2000. Dr. Robinette issued a well documented and reasoned opinion finding the presence of complicated pneumoconiosis. Dr. Westerfield found that "[a]lthough clear large opacities are not yet present they will likely develop fulfilling the radiographic criteria of Massive Pulmonary Fibrosis." (CX 10). I also found Dr. Westerfield's opinion to be well documented and reasoned. Drs. Baker and Berger examined Claimant in 1998. Due to the progressive nature of pneumoconiosis, I assign their opinions less weight in the determination of complicated pneumoconiosis because they are not as recent as the opinions of Drs. Robinette and Westerfield. Dr. Broudy examined Claimant in 1999; however, he also reviewed subsequent medical data in May and June of 2000. Unlike the preceding physicians, Dr. Broudy had the benefit of reviewing the CT scan in addition to the other medical evidence of record. I find that having this information allowed Dr. Broudy a more complete picture of the state of Claimant's health; entitling his opinion to more weight. *See generally Consolidation Coal Co. v. Director, OWCP*, 291 F.3d. 885 (7th Cir. 2002). As Drs. Broudy and Robinette are both pulmonary specialists and their opinions are well documented and reasoned, I find that these opinions support a finding of complicated pneumoconiosis, outweighing the opinion of Dr. Westerfield.

Causation of Pneumoconiosis

Once pneumoconiosis has been established, the burden is upon the Claimant to demonstrate by a preponderance of the evidence that the pneumoconiosis arose out of the miner's coal mine employment. 20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

I have found that Claimant was a coal miner for twenty-two (22) years, and that he had pneumoconiosis. Claimant is entitled to the presumption that his pneumoconiosis arose out of his employment in the coal mines. No physician opining as to the presence of pneumoconiosis offers an alternative cause to rebut this presumption. See, *Smith v. Director, OWCP,* 12 BLR 1-156 (1989). Therefore, I find that Claimant's pneumoconiosis arose from his coal mine employment.

Total Disability and Causation

The Act and the regulations provide an irrebuttable presumption of total disability due to pneumoconiosis if a miner establishes that he suffers from complicated pneumoconiosis. 30 U.S.C. § 921(c)(3); 20 C.F.R. § 718.304. Complicated pneumoconiosis can be established in one of three ways: (1) by a chest x-ray showing one or more large opacities classified in Category A, B, or C; (2) by biopsy or autopsy evidence "yield[ing] massive lesions in the lung;" or (3) by other means in accordance with "acceptable medical procedures." 20 C.F.R. § 718.304(a), (b) and (c). X-ray evidence of complicated pneumoconiosis does not trigger the automatic application of the presumption under Section 718.304 when conflicting evidence exists. *Gray v. SLC Coal Co.*, 176 F.3d 382, 388 (6th Cir. 1999); *Sexton v. Switch Energy Coal Corp.*, 20 Fed. Appx. 325 (6th Cir. 2001)(unpublished). Evidence in each category under Section 718.304(a),(b) and (c) are to be evaluated before weighing the categories together and determining invocation. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc).

I have found that the x-ray evidence established the existence of complicated pneumoconiosis as the most recent x-rays interpreted by highly-qualified physicians made that finding. As discussed above, the biopsy sample was insufficient to determine the presence of pneumoconiosis. The biopsy sample was taken to rule out the presence of silicosis and not to diagnosis pneumoconiosis. Therefore, the x-ray and biopsy evidence are not in conflict.

As discussed above, I have found that the narrative medical evidence establishes the existence of complicated pneumoconiosis. The recent opinions finding complicated pneumoconiosis outweigh the the other narrative medical opinions. In addition, each of those physicians were pulmonary specialists.

In weighing the evidence together, Claimant has produced radiographic evidence and physician opinions that establish that Claimant suffers from complicated pneumoconiosis. This evidence is not in conflict with the biopsy results. Thus, Claimant is entitled to the presumption of total disability due to pneumoconiosis under Section 718.304(a) and (c).

In sum, Claimant has proven by a preponderance of the evidence that he suffers from complicated pneumoconiosis arising out of coal mine employment and is entitled to the irrebuttable presumption contained in Section 718.304. Accordingly, he is entitled to benefits.

ENTITLEMENT

If the miner establishes that he has complicated pneumoconiosis according to 30 U.S.C. § 921(c)(3), the onset date is the month during which complicated pneumoconiosis was first diagnosed. *Truitt v. North American Coal Corp.*, 2 BLR 1-99, 1-203 to 1-204 (1979). In *Truitt*, the miner was entitled to benefits from the first month the evidence established that he had complicated pneumoconiosis, which was evidenced by the earliest x-ray interpretation finding complicated pneumoconiosis. *Id*. Claimant has established that he suffers from complicated pneumoconiosis under 30 U.S.C. §921(c). On August 14, 1998, Dr. DePonte reported Category A large opacities on an x-ray from that same date. (DX 19). This is the earliest evidence of record diagnosing complicated pneumoconiosis. Therefore, the onset date for Claimant's benefits is August 1, 1998, as August is the month during which complicated pneumoconiosis was first diagnosed.

A miner's award of benefits should be augmented on behalf of a dependent spouse or child who meets the conditions of relationship pursuant to Section 725.210. For the miner's benefits to be supplemented because of any of these relationships, the individual must qualify under both a relationship test and a dependency test.

Claimant and Wilma D. Gray, née Bowling, were married on November 30, 1991 and reside together. (DX 6). I find that Mrs. Gray is a dependent spouse for purposes of augmentation of benefits pursuant to Sections 725.204 and 725.205.

On his application for benefits, Claimant alleged that he has one dependent child, Donyia L. Gray. (DX 1). At the time Claimant was first diagnosed with complicated pneumoconiosis, Donyia L. Gray was fourteen years old. I find that Donyia L. Gray was a dependent child for purposes of augmentation of benefits at the time of the onset of Claimant's disability pursuant to Section 725.208. Augmentation of benefits continues through the month before the month in which the dependent ceased to qualify under any of the enumerate conditions. 20 C.F.R. §725.211. Donyia L. Gray reached eighteen years of age on February 19, 2002. (DX 1). The record contains no evidence that Donyia L. Gray remained Claimant's dependent after her eighteenth birthday. Therefore, I conclude that Donyia L. Gray was a dependent child for the purpose of augmentation of benefits from August 1, 1998 until January 19, 2002.

ATTORNEY'S FEE

Claimant's counsel has fifteen days from the date of receipt of this decision to submit an application for an attorney's fee. The application must be served on all parties, including Claimant, and proof of service must be filed with the application. The parties are allowed fifteen days following service of the application to file objections to the fee application. If no response is received within this fifteen day period, any objections to the requested fees will be deemed waived.

In preparing the attorney's fee application, the attention of counsel is directed to the provisions of Sections 725.365 and 725.366. According to these provisions and applicable case law, the fee application of Claimant's counsel shall include the following:

1. A complete statement of the extent and character of each separate service performed shown by date of performance;

2. An indication of the professional status (e.g., attorney, paralegal, law clerk, lay representative, or clerical) of the person performing each quantum of work and customary billing rate;

3. A statement showing the basis for the hourly rate being charged by each individual responsible for the rendering of services;

4. A statement as to the attorney or other lay representative's experience and expertise in the area of Black Lung law;

5. A listing of reasonable unreimbursed expenses, including travel expenses; and

6. A description of any fee requested, charged, or received for services rendered to the claimant before any state or federal court or agency in connection with a related matter.

ORDER

The employer, Nally & Hamilton Enterprises, is ordered to pay the following:

1. To Claimant, all benefits to which he is entitled under the Act, augmented by reason of his two dependents, commencing August 1, 1998. Augmentation by reason of the dependent child encompasses the period from August 1, 1998 until January 19, 2002;

2. To Claimant, all medical and hospitalization benefits to which he is entitled commencing August 1, 1998, or otherwise provide for such service;

3. To the Secretary of Labor, reimbursement for any payments that the Secretary has made to Claimant under the Act. The Employer may deduct such amounts, as appropriate, from the amount that it is ordered to pay under paragraphs 1 and 2 above. 20 C.F.R. § 725.602

4. To Claimant or the Black Lung Disability Trust Fund, as appropriate, interest at the rate established by Section 6621 of the Internal Revenue Code of 1954. Interest is to accrue thirty days from the date of the initial determination of entitlement to benefits. 20 C.F.R. § 725.608.

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RUDOLF L. JANSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. A copy of this Notice of Appeal also must be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.